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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1619

JAMES EUGENE PETERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 488 F. 2d 645.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1974 (Pet. App. A-1). A petition for rehearing was denied on March 29, 1974 (Pet. App. D-1). The petition for a writ of ceritorari was

filed on April 29, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1001 is constitutional as applied to statements on forms submitted for reimbursement for medical services under 42 U.S.C. 301, *et seq.*

2. Whether the trial judge properly instructed the jury.

3. Whether the evidence was sufficient to sustain petitioner's conviction.

STATEMENT

After a jury trial in United States District Court for the Northern District of Texas, petitioner was convicted on 39 counts of making false statements of material facts to a government agency, in violation of 18 U.S.C. 1001 and one count (Count 40) of conspiracy to do so, in violation of 18 U.S.C. 371. Petitioner was sentenced to concurrent terms of 13 months' imprisonment on each of Counts 1-38 and 40, with immediate eligibility for parole under 18 U.S.C. 4208(a)(2). On Count 39, petitioner was placed on probation for five years, the term to run consecutive to the imprisonment imposed. Petitioner was also fined $5,000 on each of Counts 1 and 40. Petitioner's brother, Dr. Donald Peterson, was convicted on the conspiracy count, Count 40, and placed on probation for five years and fined $10,000. The court of appeals reversed the conspiracy convictions of both defendants, but affirmed petitioner's convic-

tion on the substantive offenses (Counts 1-39) (Pet. App. A).[1]

The facts, which are also discussed in the opinion of the court of appeals (Pet. App. A-5—A-8), show that petitioner was the owner of Concord Manor, a nursing home approved by the Social Security Administration as an extended care facility and hence qualified to receive payment for hospital benefits rendered to the aged under the Medicare Act, 42 U.S.C. 1395, *et seq.* The Act prescribes a two-part scheme of remuneration to those extending aid to the elderly. Under Part A, an extended care facility may be compensated for room, board and nursing services at a per diem rate determined by agreement with its fiscal intermediary, here Mutual of Omaha. Under Part B, doctors rendering physical therapy are paid directly by a second fiscal intermediary, here Group Medical and Surgical Service of Blue Cross-Blue Shield. Prior to July 1, 1968, Part B claims were required to be filed by a physician individually on government form SSA-1490D(2), and could not be filed by a nursing home or medical organization comprised of physical therapists.[2] A 1968 amend-

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[1] In a separate civil suit, petitioner and Donald M. Peterson were ordered jointly and severally to repay the United States $31,606.72, representing double damages for 120 false claims, and an additional $100,000, representing a $2,000 forfeiture for 50 of the 120 false claims, together with interest thereon and costs. An appeal in the civil case is now pending before the Fifth Circuit, No. 74-1067.

[2] The only way in which Concord Manor could recoup its expenses would be under the Part A cost per diem agreed to

ment, however, altered the procedure by allowing a group of therapists, by forming an organization to provide physical therapy and entering into agreements with extended care facilities to render therapy prescribed by a patient's doctor, to bill directly for their services. It was this amendment which inspired petitioner's re-organization of Zodiac, Inc. At petitioner's behest, Dr. Donald Peterson was enlisted as an unpaid medical advisor to Zodiac,[3] responsible for drafting procedures that would entitle it, under the new amendments, to bill directly for costs incurred in administering physical therapy to Medicare patients (Tr. 374-376, 382, 475-480).[4]

The fraudulent claims involved in this case were for services during the first six months of 1968 be-

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by Concord Manor and Mutual of Omaha. When the conduct in question occurred, Concord's per diem rate was $12. The scheme here was fashioned to circumvent the limitations on payment for services rendered under Part A. By also filing under Part B, through use of Dr. Donald Peterson's signature, Concord Manor was in effect able to obtain separate remuneration for physical therapy, even though such costs were already included under the per diem rate.

[3] Dr. Peterson was appointed as medical advisor by petitioner. There was no meeting of the board of directors to confirm that appointment, nor could petitioner produce any minutes of the corporation which affirmed the existence of that appointment (Tr. 425).

[4] "Tr." designates the trial transcript, a copy of which is included in the appendix which was filed in the court of appeals and which is lodged with this Court. The transcript is separately paginated from the remainder of the appendix. The remainder of the appendix will be cited as "App."

fore the effective date of the 1968 amendments. During that period Zodiac furnished physical therapy to patients at Concord Manor. The therapy was administered by Helen Maeker, a registered physical therapist, and two therapy aides at the direction of petitioner and of individual patients' physicians (Tr. 233-238, 263-264, 276-277) Dr. Donald Peterson's involvement with Concord Manor was confined, by his own admission, to drafting procedures for submission to the Social Security Administration pursuant to the new amendment; at no time did he instruct Maeker or either of the physical therapy aides as to therapy for patients other than his own private patients, a number of whom were lodged at Concord Manor. No claims for these personal patients were included in the indictment. (Tr. 235-241, 263-266, 277-279, 395, 399, 481, 487, 505-508, 523, 525-527). Nevertheless, in 1969, Group Medical and Surgical Service received requests over Dr. Peterson's signature for payment of medical insurance benefits for Zodiac patients receiving physical therapy from January to June 1968. These requests were submitted on Form SSA-1490D (2), box 14 of which required that the administering doctor certify that he either supplied the services or had them provided under his personal direction (Tr. 56-60). The forms received contained Dr. Peterson's signature,[5] which had been forged by book-

[5] Exhibits 42, 47, 49, 53, 63, 74, 92, and 119, of the 120 claims filed through this procedure did not contain any signature in box 14 (See pages 165-E, 185-E, 193-E, 209-E, 249-E, 293-E, 359-E, 464-E in the two volumes of exhibits

keeper Lucille Morton at petitioner's direction (Tr. 59-60, 64, 295, 297, 302-303, 307).[6] The claims were subsequently paid to Dr. Peterson, who, after depositing them in his account, drew a new check for the same amount payable to the order of Zodiac.

Petitioner testified in his own behalf and presented character witnesses (Tr. 375-444). He denied telling Lucille Morton to sign Dr. Peterson's name to the claim forms (Tr. 404), and denied any intent to defraud (Tr. 418).

1. Petitioner contends that 18 U.S.C. 1001[7] is

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which are lodged with the Clerk of this Court; see also Tr. 93-95). As indicated by Bill West, Assistant Vice-President of the Government Programs Division of Group Hospital Service and Group Medical and Surgical Service (Blue Shield), the claims were paid through clerical error and should not have been paid without a doctor's signature (Tr. 46-47, 60, 94-95). None of these claims was among the thirty-nine for which petitioner was indicted (Tr. 26-30; App. 5A-11A). Petitioner's citation of Defendant's Exhibit 12 at 522-E (Count 3), 527-E (Count 11), 524-E (Count 22), 530-E (Count 28), and 537-E (Count 38) (Pet. 15), as showing that some of the claims in question were paid without Dr. Peterson's purported signature is without merit. Those forms were merely undated and unsigned copies filed by Lucille Morton with the bank deposit slip (See Tr. 206d, 313-315). The originals—which contain Dr. Peterson's forged signature—are found in the Government's Exhibit at 9-E (Count 3), 41-E (Count 11), 85-E (Count 22), 109-E (Count 28), and 149-E (Count 39).

[6] At no time did Mrs. Morton consult Dr. Donald Peterson concerning these billings (Tr. 296-297, 300).

[7] That section states as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States know-

unconstitutionally vague as applied to forms submitted for reimbursement for medical services under Medicare and therefore in violation of the Fifth and Fourteenth Amendments. We note initially that petitioner did not raise this issue below and therefore should not be allowed to raise it here. *Lawn* v. *United States*, 355 U.S. 339, 362 n.16. In any event, his argument has no merit. Form SSA-1490D(2) (see Pet. 10A) requires that box 14 contain the signature of a physician or supplier for the claim to be paid by the fiscal intermediary. In that box the following statement appears: "A physician's signature certifies that physician's services were *personally* rendered by him or under his *personal* direction" (emphasis added). The form itself thus makes clear that a general medical director such as Dr. Peterson was not authorized to sign the forms and recover for physical therapy that had actually been prescribed by other physicians and was not performed under his personal direction.[8] Indeed, petitioner

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ingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[8] Petitioner requested that Mr. West, the Blue Shield representative, give him the regulation relating to the definition of "personal direction" that was in effect in 1968 (Tr. 125). The court then stated "You may just send it up here and give it to Mr. Parrett [government counsel] if you find it" (Tr.

admitted that it was his understanding that prior to July 1, 1968, only a supervising physician could bill under Part B (Tr. 390-391, 405-407). Moreover, he specifically denied any knowledge of Dr. Peterson's precise duties in supervising the physical therapy administered by Zodiac at Concord Manor (Tr. 426). In these circumstances there was ample evidence from which the jury could conclude that petitioner had adequate notice that his actions—in effect double billing the fiscal intermediary—were in violation of 18 U.S.C. 1001. See generally, *United States* v. *Gilliland*, 312 U.S. 86, 91-93; *Postell* v. *United States*, 429 F. 2d 528, 529 (C.A. 6), certiorari denied, 401 U.S. 920.

2. Petitioner contends that the trial judge committed several reversible errors in her charge to the jury.

a. In her charge the trial judge stated (App. 127-A—128-A):

> The making of a false statement to an agency of the United States government is not an offense unless the statement made is a material statement. The issue of materiality, however, is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statement charged in the indictment is a material statement.

125-126). At the close of all the evidence government counsel indicated that he had turned over to petitioner all that had been turned over to the government (Tr. 528). Petitioner did not object to this procedure, nor did he introduce any of the material he was given.

Petitioner contends that this instruction was incorrect since the materiality of the purported signature of Dr. Peterson in box 14 had not been established as a matter of law. But materiality was established by the testimony of the Blue Shield representative that without the signature the claims would not have been paid (Tr. 60). Unsigned claims were paid only through clerical error (Tr. 94-95). As explained in note 5, *supra*, each false claim with which petitioner was charged was signed. We note additionally that the charge in question was specifically approved in Devitt and Blackmar, *Federal Jury Practice and Instructions*, § 33.09 (1970); see also *Blake* v. *United States*, 323 F. 2d 245, 246-247 (C.A. 8).

b. Petitioner also contends that the trial judge erred in refusing to instruct on his theory of the case—that Dr. Peterson did not have to be physically present when the physical therapy services in question were rendered (Pet. 17-22; App. 105-A, 110-A, 117-A). Petitioner's requested instructions were quite properly refused since a proper foundation had not been laid. See generally, *Mann* v. *Anderson*, 447 F. 2d 533, 537-538 (C.A. 7). To the contrary, the evidence showed that the only "direction" exercised by Dr. Peterson was through use of his title of Medical Director (Tr. 374-66, 382, 475-480). He exercised no supervision, whether by physical presence or otherwise. At no time did he give Mrs. Maeker or either of the two physical therapy aides directions concerning patients other than his own private patients (Tr. 234-241, 263-266, 276-279, 480-481). Nor did

he give the bookkeeper, Mrs. Morton, instructions as to the billing of the fiscal intermediary (Tr. 296-297, 300). Furthermore, Dr. Peterson stated that he did not sign his name to the forms, and Mrs. Morton testified that she was specifically instructed by petitioner [9] to sign Dr. Peterson's signature to the claims. (Tr. 59-60, 64, 297, 300-303). In any event, the judge adequately instructed on the quantum of proof necessary to convict petitioner as follows (App. 135-A):

> The crimes charged in this case require proof of specific intent before the defendants can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act or acts. To establish specific intent the government must prove that each defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.
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> Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any other means. While witnesses may see and hear and so be able to give direct evidence of

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[9] Petitioner's allegation that Mrs. Morton's testimony in the criminal trial differed from her deposition and testimony in the subsequent civil case is without merit. While in her deposition and testimony in the civil case, she did not say specifically that she had been instructed to sign Dr. Peterson's name, as she did at the criminal trial (Tr. 300-303), none of her subsequent testimony contradicted the fact that she acted at petitioner's instructions in completing the forms (see especially, Pet. App. C-5, C-10). When asked "[W]ho told you to put Donald Peterson's name on the form?" during the civil trial, Mrs. Morton replied "Mr. Peterson [petitioner] gave us the instructions on all of this form" (Pet. App. C-10).

what a defendant does or fails to do, of course there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does, or fails to do, may indicate intent, or lack of intent, to commit the offense charged.

Unless otherwise instructed, in determining the issue as to intent, the jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence in the case which may aid determination of state of mind.

3. Petitioner lastly seems to contend that the evidence was insufficient to sustain his conviction. As shown by the review of the evidence, *supra*, pp. 3-6, when viewed in the light most favorable to the government, there was ample proof of petitioner's participation in the scheme to make false statements to and to defraud an agency of the United States. See *Glasser* v. *United States*, 315 U.S. 60, 80.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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